Dceil Imex Sdn Bhd v Pembinaan Punca Cergas Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D-25NCC-9 OF 2010
NALLINI PATHMANATHAN J
28 AUGUST 2013

Civil Procedure — Time — Exclusion of — Arbitration proceedings that were commenced by parties declared null and void by order of court — Respondent applied for consequential order for exclusion of time pursuant to s 30(5) of the Limitation Act 1953 — Whether period between commencement of arbitration and date when arbitration was declared null and void ought to be excluded in computing time for purposes of respondent's counterclaim — Whether policy of s 30(5) applied to present case — Whether delay in filing present application for exclusion of time rendered court functus officio — Whether s 30(5) could be invoked in conjunction with s 18(8) of the Arbitration Act 2005 — Whether fit case to exercise discretion to exclude time — Arbitration Act 2005 s 18(8) — Limitation Act 1953 s 30(5)

Statutory Interpretation — Construction of statutes — Policy of statute — Whether policy of s 30(5) of the Limitation Act 1953 applied to present case — Whether word 'agreement' ought to be read into s 30(5) when it is construed — Whether use of words 'null and void' by this court could preclude application of s 30(5) — Limitation Act 1953 s 30(5)

Sometime in 6 April 2006, the appellant and the respondent decided to resolve the dispute that arose between them under a subcontract by way of arbitration under the Arbitration Act 2005 ('the Act'). On 7 February 2007, the appellant was wound up and the arbitration proceedings were stayed. On 7 June 2007, Affin Bank, the appellant's assignee under the subcontract commenced a civil suit against the respondent. The respondent pointed out that the arbitration, which had been stayed, was still pending but proceeded to file a defence to the civil suit, which included a counterclaim. At the same time, the respondent applied for and obtained leave to proceed with its counterclaim against the appellant in the arbitration. However, the appellant raised a preliminary objection to the arbitrator's jurisdiction to deal with the respondent's counterclaim. When the arbitrator ruled that he had jurisdiction to deal with the respondent's counterclaim, the appellant filed an appeal under s 18(8) of the Act against the arbitrator's decision. On 13 October 2010 the High Court overturned the arbitrator's decision and declared the arbitration null and void. The respondent then applied for leave to apply to the civil court to join the appellant as a party to the civil suit. Despite the delay caused by the appellant,

who was opposed to the respondent joining it as a party to the civil suit, the respondent eventually joined it as a party to the civil suit. The appellant then applied to strike out the respondent's counterclaim against it on the basis that the limitation period had expired. Consequently, the respondent filed the present application for an exclusion of time pursuant to s 30(5) of the Limitation Act 1953 ('the LA'). By way of this application, the respondent sought an order that the period between 6 April 2006 to 13 October 2010, namely the period between the commencement of the arbitration and the date when the arbitration was declared null and void, be excluded in computing the time prescribed by the LA for the purposes of its counterclaim. The appellant objected to this application and submitted that the court was functus officio as of the date of the handing down of the decision on 13 October 2010. The appellant also submitted that s 30(5) of the LA could not be invoked in conjunction with a High Court order made pursuant to s 18(8) of the Act. In response to the appellant's argument that its application was functus officio the respondent contended that its application under s 30(5) of the LA was a consequential or ancillary order to that of the order of court of 13 October 2010 allowing the appellant's appeal and declaring the arbitration null and void.

Held, allowing the respondent's application with costs of RM10,000:

(1) At the time when the appellant's appeal under s 18(8) of the Act was heard and allowed, limitation had not set in and the respondent had sufficient time to have its counterclaim litigated by way of the civil suit. However, the steps the respondent had to take to have its counterclaim joined as a part of the civil suit coupled with the substantive delay caused by the appellant's opposition to the respondent's leave application added to the delay. Thus, by the time the counterclaim was finally allowed to be filed as a part of the civil suit, the respondent found itself having to face a defence of limitation. However, the policy of s 30(5) of the LA was clearly to assist a litigant, who had initiated arbitration proceedings and found subsequently that those arbitration proceedings had 'ceased to exist' but at such late stage that its claim was time barred under the LA. Applying that policy to the current factual matrix it was clear beyond dispute that the current facts would fit neatly into the scenario envisaged by the policy of the section. As such, the order now sought by the respondent under s 30(5) of the LA could on a consideration of the peculiar factual matrix of this case, be considered as a 'consequential order' to the order of 13 October 2010 declaring the arbitration null and void (see paras 30–36).

(2) The fact that the respondent sought the present order for exclusion of time some two and a half years after the order of 13 October 2010, declaring the arbitration null and void, did not render this court functus officio. The delay in itself did not alter the nature of the order sought to

be obtained, especially since it fit neatly with the policy which the legislation was promulgated to achieve. It was also clear that the respondent sought relief arising as a consequence of the order of court of 13 October 2010 allowing the appellant's appeal. As such, the order sought by way of the present application was a consequential order that involved the working out of the order of 13 October 2010 (see paras 37–38).

(3) Section 30(5) of the LA could be invoked in conjunction with s 18(8) of the Act. The appellant's argument that the word 'agreement' ought to be read into s 30(5) of the LA when it is construed had no merit. It remained the precinct of Parliament to amend or vary legislation. Thus, without reading the word 'agreement' into s 30(5) of the LA, the section then allowed for an exclusion of time in the present case. This was the plain and ordinary meaning of the second limb of 30(5) of the LA, namely to exclude time which ought not to be computed by reason of the fact that such time was expended on an arbitration that ought not to have been initiated (see para 62).

(4) Further, the mere use of the words 'null and void' by the court could not preclude the application of s 30(5) of the LA to the present factual matrix relating to an appeal under s 18(8) of the Act (para 66)

(5) It was clear from the factual matrix of the case that the respondent had taken steps to have its counterclaim dealt with in the civil suit but was thwarted for a considerable period of time by the ensuing litigation. As such, this was a fit case for the court to exercise its discretion under s 30(5) of the LA (see paras 68–71).

[Bahasa Malaysia summary

Sekitar 6 April 2006, perayu dan responden memutuskan untuk menyelesaikan pertikaian yang timbul antara mereka di bawah subkontrak melalui timbang tara di bawah Akta Timbang Tara 2005 ('Akta tersebut'). Pada 7 Februari 2007, perayu telah digulungkan dan prosiding timbang tara telah digantung. Pada 7 Jun 2007, Affin Bank, pemegang serahhak di bawah subkontrak telah memulakan guaman sivil terhadap responden. Responden mengutarakan bahawa timbang tara, yang telah digantung, masih belum selesai tetapi telah diteruskan dengan memfailkan pembelaan kepada guaman sivil, termasuklah tuntutan balas. Pada masa yang sama, responden telah memohon dan memperoleh kebenaran untuk meneruskan dengan tuntutan balasnya terhadap perayu dalam timbang tara itu. Walau bagaimanapun, perayu telah menimbulkan bantahan awal tentang bidang kuasa penimbang tara untuk mengendalikan tuntutan balas responden. Apabila penimbang tara memutuskan bahawa dia mempunyai bidang kuasa untuk mengendalikan tuntutan balas responden, perayu telah memfailkan rayuan di bawah s 18(8) Akta tersebut terhadap keputusan penimbang tara. Pada 13 Oktober 2010

Mahkamah Tinggi telah membatalkan keputusan penimbang tara dan mengisytiharkan timbang tara itu terbatal dan tidak sah. Responden kemudian telah memohon kebenaran untuk memohon kepada mahkamah sivil bagi memasukkan perayu sebagai satu pihak kepada guaman sivil. Walaupun kelewatan disebabkan oleh perayu, yang membantah responden menyertainya sebagai pihak kepada guaman sivil, responden akhirnya menyertainya sebagai pihak kepada guaman sivil. Perayu kemudian memohon untuk membatalkan tuntutan balas responden terhadapnya atas dasar bahawa tempoh had masa telah luput. Berikutan itu, responden telah memfailkan permohonan ini untuk pengecualian masa menurut s 30(5) Akta Had Masa 1953 ('AHM'). Melalui permohonan ini, responden memohon perintah antara tempoh 6 April 2006 hinga 13 Oktober 2010, terutamanya tempoh antara permulaan timbang tara dan tarikh apabila timbang tara diisytiharkan terbatal dan tidak sah, dikecualikan dalam pengiraan masa yang ditetapkan oleh Akta Had Masa bagi tujuan tuntutan balasnya. Perayu telah membantah permohonan ini dan berhujah bahawa mahkamah adalah *functus officio* pada tarikh keputusan disampaikan pada 13 Oktober 2010. Perayu juga telah berhujah bahawa s 30(5) AHM tidak boleh digunakan bersama perintah Mahkamah Tinggi yang dibuat menurut s 18(8) Akta tersebut. Sebagai menjawab hujah perayu bahawa permohonannya adalah *functus officio* responden berhujah bahawa permohonannya di bawah s 30(5) AHM merupakan perintah berbangkit atau bersampingan dengan perintah mahkamah 13 Oktober 2010 yang membenarkan rayuan perayu dan mengisytiharkan timbang tara itu terbatal dan tidak sah.

Diputuskan, membenarkan permohonan responden dengan kos RM10,000:

(1) Pada masa rayuan perayu di bawah s 18(8) Akta tersebut didengar dan dibenarkan, had masa belum tamat dan responden mempunyai masa mencukupi untuk tuntutan balasnya dilitigasi melalui guaman sivil. Walau bagaimanapun, langkah-langkah yang perlu diambil oleh responden supaya tuntutan balasnya dimasukkan sebagai sebahagian daripada guaman sivil bersama dengan kelewatan melampau yang disebabkan oleh bantahan perayu terhadap permohonan kebenaran responden telah menambah kelewatan tersebut. Oleh itu, pada masa tuntutan balas itu akhirnya dibenarkan untuk difailkan sebagai sebahagian daripada guaman sivil, responden mendapati ia berhadapan dengan pembelaan had masa. Namun begitu, polisi s 30(5) AHM jelas membantu seorang litigan, yang memulakan prosiding timbang tara dan kemudian mendapati prosiding timbang tara tersebut telah 'ceased to exist' tetapi pada di peringkat akhir tersebut mendapati tuntutannya telah luput had masa di bawah AHM. Mengguna pakai polisi tersebut dengan matriks faktual semasa ia adalah jelas melampaui pertikaian bahawa fakta semasa sesuai dengan senario yang dibayangkan oleh polisi seksyen itu. Oleh itu, perintah ini yang dipohon oleh responden di

bawah s 30(5) AHM pada pertimbangan fakta matriks kes ini, dianggap sebagai 'consequential order' dengan perintah 13 Oktober 2010 yang mengisytiharkan timbang tara terbatal dan tidak sah (lihat perenggan 30–36).

(2) Fakta bahawa responden memohon perintah ini untuk pengecualian masa lebih kurang dua setengah tahun selepas perintah 13 Oktober 2010, mengisytiharkan timbang tara terbatal dan tidak sah, tidak menyebabkan mahkamah ini *functus officio*. Kelewatan itu sendiri tidak mengubah sifat perintah yang dipohon untuk diperoleh, terutamanya jika ia sesuai dengan tujuan polisi undang-undang itu digubal. Ia juga jelas bahawa responden memohon relief yang timbul akibat daripada perintah mahkamah 13 Oktober 2010 itu yang membenarkan rayuan perayu. Oleh itu, perintah yang dipohon melalui permohonan ini adalah perintah berbangkit yang melibatkan pelaksanaan perintah 13 Oktober 2010 (lihat perenggan 37–38).

(3) Seksyen 30(5) AHM boleh digunakan bersama dengan s 18(8) Akta tersebut. Hujah perayu bahawa perkataan 'agreement' patut dibaca dengan s 30(5) AHM apabila ia ditafsirkan tidak mempunyai merit. Ia kekal dalam kuasa Parlimen untuk meminda atau mengubah perundangan. Oleh itu, tanpa membaca perkataan 'agreement' dalam s 30(5) AHM, seksyen itu kemudian membenarkan pengecualian masa dalam kes ini. Ini adalah maksud jelas dan biasa pada cabang kedua s 30(5) AHM, iaitu untuk mengecualikan masa yang tidak patut dikira oleh kerana fakta masa tersebut digunakan untuk timbang tara yang tidak patut dimulakan (lihat perenggan 62).

(4) Selanjutnya, penggunaan perkataan-perkataan 'null and void' sahaja oleh mahkamah tidak boleh menghalang permohonan s 30(5) AHM terhadap fakta matriks berkaitan rayuan di bawah s 18(8) Akta (lihat perenggan 66).

(5) Adalah jelas berdasarkan fakta matriks kes bahawa responden telah mengambil langkah-langkah agar tuntutan balasnya dikendalikan dalam guaman sivil tetapi telah dihalang untuk tempoh masa yang agak lama oleh litigasi berikutnya. Oleh demikian, ini adalah kes sesuai untuk mahkamah menggunakan budi bicaranya di bawah s 30(5) AHM (lihat perenggan 68–71).]

Cases referred to

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Leung and Anor v Minister of Immigration and Multicultural Affairs (1997) 150 ALR 76, FC (refd)

Malayan United Finance Bhd v Adsonii (M) Sdn Bhd [1990] 2 CLJ 254, HC (folld)

Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642; [1992] 1 CLJ (rep) 222, SC (refd)
Oriental Bank v Edwina Lau [2011] MLJU 1244; [2012] 3 AMR 760, HC (refd)
Scotch Leasing Sdn Bhd v Chee Pok Choy & Ors [2000] 7 MLJ 253, HC (refd)
Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2) [2007] 6 MLJ 260; [2007] 9 CLJ 215, HC (refd)

Legislation referred to

Arbitration Act 1934 [UK] s 16(7)
Arbitration Act 1952 s 24(1), 25(1), (2), 26(2)
Arbitration Act 1952 (repealed by Act 646/2005) ss 18, (8), 24, 25, 26
Interpretation Acts 1948 and 1967 s 35
Limitation Act 1939 [UK] s 27(5)
Limitation Act 1953 ss 3, 30, (5)
Limitation Act 1980 [UK] s 34(5)

Wong Hok Chong (Wong Hok Chong & Co) for the plaintiff.
Lim Chong Fong (Karen Ng Gek Suan with him) (Azman Davidson & Co) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] Pembinaan Punca Cergas, the respondent here, seeks vide this application, an order pursuant to s 30(5) of the Limitation Act 1953. In essence that section allows the court, in the exercise of its discretion, to exclude that period of time between the date of commencement of an arbitration, and the date on which the court declares the arbitration to cease to have effect, for the purposes of computing time in relation to the limitation period for any given cause of action in relation to that dispute.

[2] Section 30(5) of the Limitation Act 1953 provides as follows:

> (5) Where the High Court orders that an award be set aside or orders, after the commencement of an arbitration, *that the arbitration shall cease to have effect with respect to the dispute referred*, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribe by this Act or any such written law as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.(Emphasis added.)

[3] The parties here are termed 'appellant' and 'respondent' because the origin of this application is an appeal between the parties in relation to an

appeal on a jurisdictional issue, more particularly, s 18(8) of the Arbitration Act 2005 ('the Act'). This application for an exclusion of time is made under, and pursuant to that appeal, hence the parties remain the 'appellant' and 'respondent'. It is the respondent that seeks to have this specific time period excluded for the purposes of computing limitation in relation to a counterclaim which it seeks to bring against the appellant.

SALIENT BACKGROUND FACTS

[4] The background facts leading up to this application are as follows: The appellant and the respondent here embarked on an arbitration under the Arbitration Act 2005 ('the Act') in relation to a dispute arising between the parties under a subcontract, in or around 6 April 2006. Pleadings were filed including the respondent's counterclaim against the appellant dated 9 August 2006. The respondent had requested for the issue of the appellant's right to claim under the sub-contract to be determined as a preliminary issue but the appellant objected to this. Then on 7 February 2007 the appellant was wound up, as a consequence of which the arbitration proceedings were stayed.

[5] In the interim, on 7 June 2007, Affin Bank as the assignee of the appellant under the subcontract commenced a civil suit against the respondent. There was a clear overlap between the claims in the civil suit and the arbitration which had been stayed. The respondent therefore filed a defence in the civil suit stating that it was entitled to plead a counterclaim which in turn entitled the respondent to set-off or extinguish the appellant's claim. It was also pointed out that the arbitration was still pending. However leave had to be obtained to pursue this counterclaim because the appellant had been wound up.

[6] On 22 July 2009 the winding up court granted leave for the respondent to proceed with its counterclaim against the appellant in the arbitration.

[7] On 21 December 2009, the appellant raised a preliminary objection to the arbitrator's jurisdiction to deal with the respondent's counterclaim against it. The appellant alleged that Affin Bank as an assignee of the subcontract had not consented to the arbitration proceedings. The arbitrator, on 17 May 2010, ruled that he had jurisdiction to deal with the respondent's counterclaim.

[8] The appellant then filed an appeal by way of originating summons under s 18(8) of the Act, against the arbitrator's decision that he had jurisdiction to hear the dispute between the appellant and the respondent.

[9] On 31 October 2010 the High Court allowed the appeal, overturning the arbitrator's decision and went on to hold (at the behest of the appellant), inter alia, that:

(a) The arbitration commenced by the appellant and the appointment of the Arbitrator in this Arbitration was null and void;

(b) The Arbitrator has no jurisdiction to continue with the respondent's counterclaim …

[10] Pursuant to the order granted by the High Court therefore the arbitration was declared null and void. As that decision is not appealable under the Arbitration Act 2005, the respondent applied to the winding up court for leave to apply to the civil court to join the appellant in the civil suit.

[11] The appellant opposed this application for leave to join it as a party to the civil suit. Leave was granted on 10 August 2012. An appeal was filed to the Court of Appeal on this point but the appellant's appeal was dismissed on 16 January 2013.

[12] With the grant of leave the respondent filed an application to join the appellant in the civil suit which was allowed on 7 November 2012. This decision was also upheld by the Court of Appeal on 5 April 2013.

[13] Notwithstanding that the delay in joining the appellant was attributable to these appeals against the order joining it as a party, the appellant then applied to strike out the respondent's counterclaim against it on the basis that the limitation period had expired.

[14] The respondent's then filed the present application seeking to exclude for the purposes of computation of the limitation period for their counterclaim, that period between the date of commencement of the arbitration and 13 October 2010, namely the date when the arbitration was declared null and void. This application however is filed some two and a half years after the appeal was allowed by this court.

[15] In support of this application the respondent maintains that there are two situations where the High Court can make an order under s 30(5) of the Limitation Act 1953.

(a) where the High Court orders that an arbitration is set aside; or

(b) *where the High Court orders after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred.*

[16] The respondent clearly seeks to have time excluded under (b), namely where the court orders after the commencement of an arbitration that the arbitration shall cease to have effect with respect to the dispute referred.

[17] The respondent points to the fact that the High Court in hearing the s 18(8) appeal, had ruled that the arbitration commenced by the appellant and

the appointment of the arbitrator was null and void. It had also ruled that the arbitrator has no jurisdiction to continue with the respondent's counterclaim.

[18] Accordingly, it is submitted for the respondent that this case falls into category (b) above, whereby this court is statutorily empowered to make an order that the period between the commencement of the arbitration on 6 April 2006 up to and until 13 October 2010, ie the date of the court order, may be excluded in computing time prescribed by the Limitation Act for the purposes of the respondent's counterclaim against the appellant.

[19] The appellant strenuously objects to this application on the following grounds:

(a) s 30(5) of the Limitation Act cannot be invoked in conjunction with a High Court order made pursuant to s 18(8) of the Act;

(b) the High Court did not order that 'the arbitration ceased to be effective when the appellant company was wound up';

(c) the High Court is functus officio; and

(d) the High Court should not exercise its discretion to exclude time from computation of the limitation period.

[20] Each of these issues will be considered in turn, beginning with issue (c).

ISSUE (C): IS THE COURT FUNCTUS OFFICIO?

[21] Both parties were not substantially in dispute in relation to the law on this issue. However while the respondent maintained that the present application amounted in essence to seeking an order consequential upon the order allowing the appellant's appeal under s 18(8) of the Act, the appellant maintained on the contrary that it was not a consequential order but a substantive new order which this court could not issue, given that it was functus officio. In other words the appellant maintained that this order seeking to exclude time should have been sought at the point in time when the appellant's appeal was allowed. The appellant so maintained upon a construction of s 30(5) of the Limitation Act 1953.

[22] For the respondent in support of the proposition that the court was not functus officio, it was submitted that the principle meant that the final decision of a court could not be re-opened, (see *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260; [2007] 9 CLJ 215, 223 referring to *Leung and Anor v Minister of Immigration and Multicultural Affairs* (1997) 150 ALR 76). The reason was that the power to re-open the dispute had been transferred to the court of appeal. Reference was made, inter alia, to *Hock Hua*

Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 where the Federal Court in explaining this principle held that: … *the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as it is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.*

[23] And in *Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, 649; [1992] 1 CLJ (Rep) 222, 223 the Federal Court held:

> the learned judge was clearly functus officio after he made the order for sale on 29 August 1990. In this case the order for sale was made, drawn up and perfected and the learned judge was functus officio and therefore had no power to *set aside* the order for sale which was a final order.' (Emphasis added.)

[24] The respondent submits that the principle of functus officio is not applicable on the present facts because it is not seeking to either *re-open, set aside, vary, alter or amend* the decision of this court. It is reiterated that the principle applies only where an application seeks to do one of the foregoing. *Instead the respondent maintains that it is seeking a consequential or ancillary order, namely one that is consequential upon or ancillary to the order of this court dated 13 October 2010 which declared the arbitration to be null and void.*

[25] In support of the contention that the exclusion of time proviso under s 30(5) is a consequential or ancillary order to that of the order of court of 13 October 2010 allowing the appellant's appeal, the respondent relies, inter alia, on the following cases:

(a) *Oriental Bank v Edwina Lau* [2011] MLJU 1244; [2012] 3 AMR 760, a decision of the High Court which made reference to the decision of the Federal Court in *Mui Bank Bhd (Beh Sai Ming, Intervener) v Cheam Kim Yu* [1992] 2 MLJ 642; [1992] 1 CLJ (Rep) 222:

> However, an important distinction in the above case compared to the instant proceedings is this. The applicant herein, Hong Leong Bank is a beneficiary of a vesting order under s 50 of the BAFIA. Hong Leong Bank is not seeking to set aside the order for sale. Instead it is applying to intervene and enforce the order for sale. *The Supreme Court in Mui Bank Bhd v Cheam Kim Yu clearly implied that the court is not functus officio in granting consequential orders. The Supreme Court had said as follows in the preceding passage*:
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> > *True, after making an order for sale the judge has the power to make other orders including changes in the reserve price and the auction sale dates but such orders are consequential to the order for sale.* (Emphasis added.)

[26] And in *Scotch Leasing Sdn Bhd v Chee Pok Choy & Ors* [2000] 7 MLJ 253. The court similarly held that the principle of functus officio does not apply to consequential orders, relying on the observation of Edgar Joseph Jr J in *Malayan United Finance Bhd v Adsonii (M) Sdn Bhd* [1990] 2 CLJ 254.

[27] The appellant in response maintains, to the contrary, that this court is functus officio as of the date of the handing down of the decision on 13 October 2010, when the appeal was disposed of. It is submitted for the appellant that the respondent ought to have sought an exclusion of time for the computation of the limitation period for its counterclaim, at that stage and not two and a half years later. In support of this proposition the appellant cites a passage from *The Law and Practice of Commercial Arbitration in England* by Mustill & Boyd 1989 at p 197, para 3 where this issue is dealt with in relation to s 34(5) of the English Limitation Act which is similar to s 30(5) of the Limitation Act 1953, in that it deals with the exclusion of time for the purposes of limitation:

> … The policy of the section is plain. If the award or the arbitration were set aside, the claimant might find that by the time the court had dealt with the matter and had in effect caused the existing arbitration proceedings to disappear, it would be too late for him to start fresh proceedings without becoming time-barred.
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> *Accordingly the statute provides that the running of time is interrupted between the moment when the claimant commenced the original arbitration, and the moment when the court makes the order setting the award or the arbitration aside.* In effect the claimant is left with such time for starting a fresh arbitration as remained to him when he gave his original notice to arbitrate …
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> … The section does not operate automatically, but merely give the court a discretion; *so a claimant should remember to ask for an order prolonging the time, when a question of setting aside the award or the arbitration is before the court* … (Emphasis added.)

[28] It is further submitted for the appellant that while the court retains an inherent jurisdiction after final judgment has been pronounced in limited circumstances, where the judgment needs working out, the court cannot deal with matters which do not arise in the working out of the judgment.

[29] In the instant case the appellant points to the fact that there is nothing in the judgment or order of 13 October 2010 that requires 'working out'. Reliance is placed on *Halsbury's Laws of England 2001* (Vol 370, para 1228) which serves to define the ambit of subsequent orders and applications. It is evident that while all orders of the court carry with them an inherent liberty to apply to the court, such liberty is limited to enable parties to seek assistance in working out the rights declared by the final order of court. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order.

[30] It appears to this court that the issue of whether the court is functus officio or otherwise turns on whether the present application can be viewed as a consequential or ancillary order or amounts to a working out of the order of 13 October 2010 on the one hand, or whether it in effect amounts to the grant of a substantive right, on the other hand, such that it cannot be termed 'consequential' or 'ancillary'.

[31] It is material that by reason of the declaration of the arbitration as null and void, the respondent here was constrained to bring the same subject matter, namely its counterclaim which it could not have litigated in the arbitration proceedings, to the forum of the civil courts where a civil suit was pending. At the time when the s 18(8) appeal filed by the appellant was heard and allowed, limitation had not set in and the respondent had sufficient time to have its counterclaim litigated by way of the civil suit.

[32] However matters were further complicated by the fact that the appellant was in liquidation which meant that leave had to be obtained to proceed with any claim against the appellant. To add to the delay the appellant not only opposed the application for leave but also appealed against the orders granting such leave. While the appellant is not to be faulted for pursuing all avenues open to it to preclude the joinder of such a counterclaim, there is no doubt that this added to the delay in having the counterclaim made a part of the civil suit. When this was finally achieved, the appellant then sought to rely on the defence of limitation to preclude the respondent from pursuing its claim against the appellant.

[33] It is evident that the order now sought by the respondent, in the normal course of events, ought to have been sought at or near the time when the court declared that the arbitration between the parties was 'null and void'. This is clear from the passage from Mustill referred to above. However it is equally clear from that passage that the policy of the section, ie s 30(5), which is equivalent to s 34(5) of the English Limitation Act is to assist a litigant who has initiated arbitration proceedings, and finds subsequently that those arbitration proceedings had come to an end or 'ceased to exist' but at such a late stage that any attempt to re-initiate proceedings would result in a finding that the claim is time-barred under the Limitation Act. In these circumstances this section comes into play to effectively 'cut out' the entire time period of the arbitration as if it had not occurred, such that the litigant is left with as much time as he originally had at the onset of the arbitration for the purposes of computing time under the limitation act in relation to his claim.

[34] Applying that policy to the current factual matrix it is clear beyond dispute that the current facts fit neatly into the scenario envisaged by the policy of the section. In the instant case the respondent had in fact initiated the

counterclaim. This is not a situation where the respondent 'sat' on his rights or was less than diligent in any way. However the arbitrator simply had no jurisdiction to hear the counterclaim by reason of the assignment of rights under the subcontract to Affin Bank. Therefore the arbitration was held to be null and void. The net effect was that the arbitration came to an end.

[35] Despite the fact that the respondent, who was not at that stage time barred, took steps to have its counterclaim joined as a part of the civil suit, this step was delayed substantively by the appellate process such that by the time the counterclaim was finally allowed to be filed, the respondent found itself having to face a defence of limitation.

[36] It appears to this court that the order now sought by the respondent under s 30(5), may on a consideration of the peculiar factual matrix of this case, be considered a 'consequential' order to the order of 13 October 2010 declaring the arbitration null and void. The application for an order under s 30(5) can only be made in circumstances in which the arbitration ceases to exist. In other words the grant of the relief under this section only arises in situations such as the present where the entire arbitration process is declared not to have existed. As such it is consequential upon an order holding that an arbitration ceases to exist. It cannot arise in any other manner. It is therefore consequential upon, or ancillary to a primary order that an arbitration ceases to exist.

[37] The only 'flaw' as it were in this case is that the respondent seeks to have this order made some two and a half years after the order declaring the arbitration null and void was made. Does this delay in itself therefore render this court functus officio? To my mind, it does not because the delay in itself does not alter the nature of the order sought to be obtained. Fundamentally, this order sought is an order which arises as a consequence of the decision on the appeal handed down by the High Court. It fits in neatly with the policy which the legislation was promulgated to achieve.

[38] It is also clear that the respondent is not seeking vide this application to amend or vary or alter in any manner whatsoever the declaration with regards to the arbitration which remains entirely unassailable and untouched. The respondent instead seeks relief arising as a consequence of that appeal. It can be said that this is a matter touching upon the rights of the parties which requires 'working out' as a consequence of the judgment or decision on jurisdiction. But as it no manner seeks to alter the final nature of the declaration in relation to the arbitration it cannot be said that the court is functus officio. Accordingly this contention of the appellant is dismissed.

[39] Issues (a) and (b) will be considered together.

(a) can s 30(5) of the Limitation Act be invoked in conjunction with a High Court order made pursuant to ss 18(8) of the Act;

(b) The High Court ordered that the arbitration was 'null and void' but did not order that 'the arbitration ceased to be effective when the appellant company was wound up'.

[40] The central issue in this application is whether s 30(5) is applicable when an order is made under s 18(8) of the Act.

A perusal of s 30(5) discloses that the court is accorded the discretion to exclude time in the following instances, namely where the court either orders that:

(a) an award be set aside; or

(b) after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred.

[41] The policy of the section has been dealt with above and is as set out in the passage in Mustill & Boyd.

[42] In the present context, we are concerned with the application of limb (b), or the second limb of s 30(5), ie a circumstance where after the commencement of arbitration the court orders that the arbitration shall cease to have effect.

[43] The appellant argues that the second limb of s 30(5) of the Limitation Act was intended to coincide with a situation when the court 18 made an order that *the arbitration agreement ceases to have effect.* As a matter of fact the word agreement does not appear in s 30(5). The appellant argues that the word agreement ought to be read into the section. To substantiate this the appellant points to the fact that this exclusion of time provision takes its roots from as far back as s 16(7) of the United Kingdom Arbitration Act 1934. It was subsequently repealed and introduced as s 27(5) of the Limitation Act 1939 in the United Kingdom, but with an error, namely that the word agreement was inadvertently omitted from the second limb.

[44] The United Kingdom Legislature acknowledged this error and rectified it in their Limitation Act 1980, where the same exclusion of time provision was reproduced as s 34(5) with the word agreement re-inserted into the second limb of the provision.

[45] However our Limitation Act 1953 is premised on the 1980 Limitation Act of the United Kingdom and also leaves out the word 'agreement'. In these circumstances the appellant submits that the word agreement ought to be read into the second limb of s 30(5) of the Limitation Act 1953. A failure to read the word agreement into the second limb would result, according to the appellant,

in s 30(5) being rendered inapplicable because the words in the second limb would no longer coincide with any of the provisions of the Arbitration Act of 1952 (or the current Act).

[46] Having sought to have the word 'agreement' read into the second limb, the appellant then submits that the phrase in the second limb, namely *that the arbitration (agreement) shall cease to have effect with respect to the dispute referred* has to be construed very narrowly, and that too within the context or regime of the now repealed Arbitration Act 1952, the predecessor of the Arbitration Act 2005.

[47] To this end the appellant submits that s 30(5) of the Limitation Act 1953 was only meant to coincide with three specific situations or sections of the 1952 Arbitration Act by reason of the very specific wording of the second limb.

[48] The appellant submits that these express words, namely *where the arbitration (agreement) ceases to have effect* only occurs in three distinct sections of the 1952 Arbitration Act, (not the present Act) namely:

(a) where the arbitrator is removed on grounds of having misconducted himself or the proceedings (s 24(1) read together with s 26(2));

(b) where the authority of the arbitrator is revoked on grounds of impartiality s 25(1) read together with s 26(2); and

(c) where the dispute includes elements of fraud (s 25(2)).

[49] It is contended that s 30(5) has no application under the current Act, as the phrase *where the arbitration (agreement) ceases to have effect* does not appear in the current Act.

[50] In other words the appellant contends that the express words used in s 30(5) of the Limitation Act have to be construed and interpreted strictly in conjunction with the 1952 Arbitration Act such that it is only in the limited circumstances set out above that the court is empowered to exclude time.

[51] In all other instances, in other words, the court is not empowered so to do, according to the appellant. As such in the instant case which falls within s 18(8) and not ss 24, 25 or 26 of the 1952 Arbitration Act, the entire section is inapplicable.

[52] As the present matter is brought within the context of the new arbitration regime under the Arbitration Act 2005, s 30(5) it is contended, is simply inapplicable, as the remedy of allowing the court to hold that 'the arbitration shall cease to have effect' has been completely removed. As that

remedy has been removed completely, it appears that the second limb of s 30(5) which was not amended accordingly to meet the Act, is rendered otiose or redundant.

[53] The appellant therefore concludes that save for legacy cases under the 1952 regime, the second limb of s 30(5) of the Limitation Act is not relevant and is certainly inapplicable in the present instance.

[54] The respondent replies on the contrary that under the regime of the present Act, the Limitation Act of 1953 remains the act governing the period of limitations. It is submitted that this is so because there are no other written laws and the Act itself does not provide any provisions with regard to limitation. The respondent in other words contends that it s 30(5) is to be construed as it has been drafted without the insertion of the word 'agreement', and the second limb given its ordinary and natural meaning.

[55] The respondent points to the undisputed fact that the appellant's appeal to this court under s 18(8) appealing against the decision of the arbitrator on jurisdiction was done so under the regime of the Arbitration Act 2005 and not the 1952 Act. The Arbitration Act 2005 does not contain specific provisions relating to limitation and accordingly the respondent submits that the act governing limitation in arbitration must still be the Limitation Act 1953.

[56] This must be so, it is argued because unlike the present arbitration legislation in the United Kingdom, namely the UK Arbitration Act 1996, which contains provisions with regards to limitation, the Arbitration Act 2005 does not. Such a provision dealing with limitation is only to be found in ss 3 and 30 of the Limitation Act 1953 which provides as follows:

> Section 3: This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law…
>
> Section 30(1): This Act and any other written law relating to the limitation of actions shall apply to arbitrations as they apply to actions…

[57] The respondent also makes reference to s 35 of the Interpretation Acts 1948 and 1967 which support the proposition that s 30 of the Limitation Act 1953 is to be read together with the current Arbitration Act 2005:

> *Reference to written law*
>
> 35(1) A reference to a particular written law
>
> (a) Is a reference to that law as amended or extended from time to time; and
>
> (b) Includes a reference to any subsidiary legislation made thereunder.

A (2) Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law or provision so repealed shall be construed as references to the re-enacted law or provision.

B **[58]** It follows from the foregoing that references in the Limitation Act 1953 to the Arbitration Act 1952 continue to be applicable to the Arbitration Act 2005. Accordingly it is submitted, and I would concur, that it is erroneous to conclude that s 30(5) is redundant under the provisions of the Arbitration Act 2005.

C

[59] The respondent further submits that s 30(5) should be construed as it reads, namely without the insertion of the word 'agreement' as submitted by the appellant. In the absence of any amendment by the Legislature of s 30(5) D the respondent maintains that the second limb should simply be read accordingly and that there is no room for insertion of the word 'agreement'. As such then the respondent maintains that the relief to be provided under the second limb in Malaysia is wide as it covers a variety of situations where the court orders that the 'arbitration ceases to have effect', rather than the three E specific situations which the appellant identified above. Such situations would include:

(a) a situation where the dispute referred to is outside the scope of the arbitration agreement, but does not impugn the arbitration agreement F itself;

(b) situations where for example the contract containing the arbitration agreement is tainted by fraud, in which case the arbitration agreement ceases to have effect;

G (c) situations such as the present case where an arbitration commenced under an assigned contract resulted in a challenge to the arbitrators jurisdiction which was upheld by the High Court thereby rendering the arbitration null and void, which in practical terms amounted to the arbitration ceasing to have effect.

H

[60] The respondent further submits that construing s 30(5) with the Arbitration Act 2005 (or the 1952 Act) works well in that it covers all jurisdictional scenarios, as the legislation is currently framed, namely without I the word 'agreement' read into the section.

[61] Finally it is contended for the respondent that it is the role of Parliament to amend s 30(5) to justify a more restricted word with the addition of the word 'agreement'. It is not the role of this court, it is submitted to usurp the role of

Parliament by reading into the section words which are not there.

DECISION ON ISSUE (A):

[62] Having considered the competing submissions of counsel for the appellant and the respondent as well as the relevant sections, namely s 30(5) of the Limitation Act and the provisions of the Arbitration Act 2005 (or 1952) it appears to this court that s 30(5) of the Limitation Act 1952 can be invoked in conjunction with a High Court order made pursuant to s 18(8) of the Act for the following reasons:

(a) In construing s 30(5) of the Limitation Act which deals with situations where an arbitration *ceases to have effect with respect to the dispute referred* regard must be given to the policy of the section. It is not in dispute that the purpose of the section is to assist a claimant who finds that by the time an existing arbitration is held to *cease to have effect with the dispute referred* he may find his claim time barred. As such is the policy, the current factual matrix falls neatly within precisely such a situation. This is a case where the respondent who sought to prosecute its counterclaim in the subsisting arbitration between itself and the appellant, found that the arbitration was held to be null and void.
This has resulted for varying reasons (as set out above) in the respondent's counterclaim being time barred unless time is excluded as provided for in s 30(5). There is no doubt that the arbitration ceased to exist as of 13 October 2010. Accordingly this is a case that falls within the scope of cases envisaged by s 30(5) of the Limitation Act 1953, on a plain and ordinary reading of that section;

(b) I am unable to concur with learned counsel for the appellant that the word 'agreement' is to be read into s 30(5) when it is construed. Notwithstanding the compelling arguments made out, it remains the precinct of Parliament to amend or vary legislation. It is not the role of this court to read into s 30(5) the word 'agreement' which will then give the section an altogether different definition, narrowing and constricting its scope. It is not evident that the intention of the provision is to provide relief in a few, restricted instances such as submitted by the respondent.

(c) without reading the word 'agreement' into s 30(5), the section then allows for an exclusion of time in instances where the *arbitration shall cease to have effect with respect to the dispute referred*. It follows from the foregoing that there are a variety of instances that result in an arbitration ceasing to have effect. In this context I concur respectfully with learned counsel for the respondent that the second limb has application and is intended to apply in a variety of situations as enumerated and set out above. As such I do not accept, respectfully, that the words of s 30(5) should be read so literally as to apply solely in the three situations

outlined by learned counsel for the appellant. The second limb as it reads presently refers to all instances of 'arbitrations' which are held to have ceased to exist and such a phrase must necessarily be accorded a wide or broad interpretation. This is consonant with the policy of the section;

(d) On the issue of the alleged inapplicability of s 30(5) to the current Arbitration Act 2005, I again concur that on the application of s 35 of the Interpretation Acts 1948 and 1967, it follows that s 30(5) remains wholly applicable to the Arbitration Act of 2005. The fact that the current Act does not describe or provide expressly for situations where 'the arbitration shall case to have effect with respect to the dispute referred' does not and cannot mean that s 30(5) is deemed otiose. That would in fact leave the current Act with no provisions as to limitation which is not the intention or purport of the legislation albeit the current Act or s 30(5) of the Limitation Act;

(e) Section 18 of the Arbitration Act deals with the competence of an arbitral tribunal to rule on its jurisdiction and allows in sub-s 8 for an appeal to the High Court. It is evident that upon any such appeal, the High Court may rule either that the tribunal has jurisdiction or does not possess jurisdiction to deal with the dispute in question. In the latter event, and given that the decision of the High Court is final, the arbitration will of necessity come to an end. It will, in effect 'cease' to be operative or effective in relation to that dispute between the parties. The arbitration can only come to an end upon the pronouncement by the High Court of its decision on a lack of jurisdiction. Up to and until that time, (assuming the arbitral tribunal concluded that it had jurisdiction) the arbitration proceeds and subsists as a matter of fact. Accordingly once the High Court has concluded that the arbitral tribunal has no jurisdiction as is the case here, it is indeed a situation where the arbitration ceases to have effect with respect to the dispute referred to it. This is the plain and ordinary meaning of the second limb of s 30(5), which, more significantly, also achieves the purpose for which it was promulgated. It serves to exclude time which ought not to be computed by reason of the fact that such time was expended on an arbitration which ought never to have been initiated.

ISSUE (B): THE HIGH COURT ORDERED THAT THE ARBITRATION WAS 'NULL AND VOID' BUT DID NOT ORDER THAT 'THE ARBITRATION CEASED TO BE EFFECTIVE' WHEN THE APPELLANT COMPANY WAS WOUND UP

[63] In summary, the thrust of the appellant's contention is that as the High Court order reads that the arbitration was held to be null and void, rather than

'ceased to be effective' as envisaged by the express words in the second limb of s 30(5), the current case does not fall within the purview of the section.

[64] In this context, it is argued, inter alia, that the words null and void mean that the arbitration never subsisted, as opposed to 'ceased to be effective' which suggests that the arbitration commenced and stopped at a given point in time.

[65] It is material to remember that the High Court appeal resulting in the order of 13 October 2010 was brought by the appellant and not the respondent here. As such it was the appellant who chose to use the 28 words 'null and void' in seeking to invoke s 18(8) of the Act. The High Court in agreeing that the arbitrator had no jurisdiction to deal with the dispute then went on to grant the prayers sought by the appellant. Hence the use of the words 'null and void'.

[66] Notwithstanding this, the appellant now seeks to rely on its own prayers to seek to preclude the respondent from procuring the statutory relief afforded by s 30(5) in relation to exclusion of time. I have already concluded above that to my mind, s 30(5) can be invoked in conjunction with s 18(8) of the Act. It therefore follows that the mere fact that the court utilised the words 'null and void' (that too at the behest of the appellant) cannot detract from the fact that as a matter of fact the arbitration did in fact subsist and took place between 6 April 2006 and 13 October 2010. The fact that the arbitration proceeded as a matter of fact for several years cannot simply be erased. When the court held that the arbitration was null and void it did so notionally, in view of the fact of the finding that the arbitrator had no jurisdiction to hear the matter. The court did not hold that the actual arbitration which transpired over those years was wiped out or never took place. In law however given the lack of jurisdiction the arbitration was null and void. But as a matter of fact, the arbitration commenced and was brought to an end by the order of court of 13 October 2010. As such the mere use of the words 'null and void' by this court cannot preclude the application of s 30(5) of the Limitation Act to the present factual matrix relating to an appeal under s 18(8) of the Arbitration Act 2005, and I so hold. This contention of the appellant is also dismissed.

ISSUE (D): SHOULD THIS COURT EXERCISE ITS DISCRETION UNDER S 30(5) OF THE LIMITATION ACT 1953 TO EXCLUDE TIME OR NOT?

[67] The appellant contends that the court ought not to exercise its discretion in the appellant's favour because the respondent did not take prudent steps to commence civil proceedings against the appellant before the expiry of the limitation period in January 2012 at the very latest. Alternatively it is contended that the respondent ought to have taken steps to commence a protective writ.

[68] In relation to this issue the history and chronology of this matter is most pertinent. I have set out the same in full in the background facts and do not propose to repeat the same. Suffice to say that there was no question of the respondent taking out a writ during the course of the arbitration. This would not have been possible. In other words, there was no question of the respondent filing an action prior to 13 October 2010, as the arbitration was subsisting and the respondent could have its counterclaim dealt with there.

[69] It is also clear from the factual matrix that after the appellant's appeal succeeded on 13 October 2010, the respondent took steps to commence the counterclaim or include it in the civil suit. However matters were delayed by reason of the appellant being in liquidation, which necessitated the procurement of leave. To exacerbate matters, the leave application was heavily contested not only at the High Court level but also in the Court of Appeal. This necessarily took time.

[70] In these circumstances I am satisfied that the respondent did in fact take steps to have its counterclaim dealt with in the civil suit but was thwarted for a considerable period of time by the ensuing litigation. When the respondent sought to do so, after the grant of the 13 October 2010 order, time was not in issue.

[71] In these circumstances I am unable to agree with learned counsel for the appellant that the respondent failed to act prudently or diligently. As such I am satisfied that this is a fit case for this court to exercise its discretion under s 30(5) and I so order. Accordingly the respondent is granted an order in terms as set out in encl 6, the net effect of which is to exclude time for the period between the commencement of arbitration on 6 April 2006 until the order of court of 13 October 2010 for the purposes of computing time prescribed under the Limitation Act 1953. The costs of this application in the sum of RM10,000 are to be borne by the appellant.

Respondent's application allowed with costs of RM10,000.

Reported by Kohila Nesan